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CLERK US DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISIONROBERT T. O'DONNELL AND  
WILLIAM K. BROWN  
Plaintiffs,§  
§  
§  
§  
§  
§  
§  
§

v.

CIVIL ACTION NO. A 03 CA 902 LY

GREG ABBOTT, ATTORNEY GENERAL  
FOR THE STATE OF TEXAS  
Defendant.

## DEFENDANT'S SUPPLEMENTAL BRIEF

TO THE HONORABLE LEE YEAKEL:

Pursuant to the Court's order requesting supplemental briefing on relevant legislation, Hon. Greg Abbott, Attorney General of Texas, defendant, respectfully submits the following.

The legislation identified by the plaintiffs appears to have been drafted with them in mind and has the potential to render their lawsuit moot. But some uncertainty remains. First, for House Bills 1238 and 2668 to moot this litigation, the plaintiffs must make it clear that they seek no retrospective relief. In their briefing and at trial, the plaintiffs have sometimes seemed to be seeking compensation for past injury.

Even if the legislation has mooted the case, and even if this lawsuit was a "catalyst" for the legislation, the plaintiffs are not entitled to recover attorneys fees. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 531 U.S. 598, 600-09, 121 S.Ct. 1835, 1838-43 (2001).

However, the prospect of mootness is not certain as to prospective relief. H.B. 1238 adds subsection (e) to TEX. FAM. CODE § 234.008, providing that if the defendant is notified by federal

child support authorities that the legislation results in the state's loss of eligibility, the arrangement created by the bill "is null and void [and] is not effective." That contingency would restore the situation that gave rise to this suit. *See Buckhannon Bd. & Care Home*, 531 U.S. at 609, 121 S.Ct. at 1842-43 ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'").

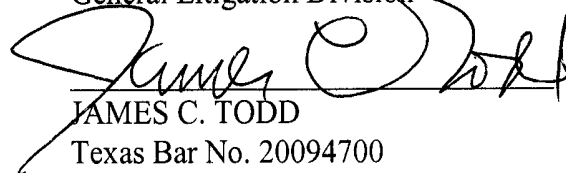
Respectfully submitted,

GREG ABBOTT  
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First Assistant Attorney General

EDWARD D. BURBACH  
Deputy Attorney General for Litigation

JEFF L. ROSE, Chief  
General Litigation Division



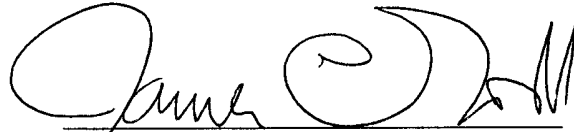
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ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent via U.S. mail on August 1, 2005, to:

Michael C. Crowley  
Frank M. Reilly  
POTTS & REILLY, L.L.P.  
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A handwritten signature in black ink, appearing to read "James C. Todd", written over a horizontal line.

James C. Todd  
Assistant Attorney General